IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 6657 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? YES.

2. To be referred to the Reporter or not? YES.

3. Whether Their Lordships wish to see the fair copy of the judgement? NO.

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? NO.

5. Whether it is to be circulated to the Civil Judge? NO.

ANCHOR CAPITALS OF INDIA LTD.

Versus

STATE OF GUJARAT

Appearance:

MR YF MEHTA for Petitioners

MR KP RAVAL APP for Respondent No. 1

MR MJ DAGLI for Respondent No. 2

CORAM : MR.JUSTICE M.H.KADRI

Date of decision: 22/04/98

ORAL JUDGEMENT

1. Petitioners have filed this application under Section 482 of the Code of Criminal Procedure, 1873, (to be referred to as " the Code ") to quash the complaint which is registered as Criminal Case No.2793/96 before the Metropolitan Magistrate Court No.16, Ahmedabad, for the offences punishable under Section 138 of the

Negotiable Instruments Act, 1881 (to be referred to as " the Act ").

2. Petitioner No.1 Anchor Capitals of India Limited is doing business of financing and ancillary activities and in furtherance of the said activity, the Company had to appoint various agents to conduct the business of the Company, with limited authority and power. In the month of October 1996 it came to the notice of the present petitioner- Company that various agents have played fraud with the company and have misused the cheques given to them. A newspaper item was published in the daily newspaper "Lokdesh" on 5-2-97 with regard to the fraud committed by the agents of the Company by misusing the cheques given to them. Respondent No.2 had transaction with the agents of the Company at Ahmedabad, and had obtained cheques written in in the name of Mahesh Lable Company. Respondent No.2 who is sole proprietor of Mahesh Label Co. had given the said cheques received by her from various parties of Ichal Karanjee, Dist : Kolhapur, Maharashtra State and delivered the said cheques to the petitioner-Company. That the petitioners after taking their commission had in turn issued these cheques in favour of the respondent No.2. The details of the said cheques are as under :

Name of the Bank	Cheque No.	Amount	Date of cheque.
1.Siddhi Co.Op.Bank, Dhan Laxmi Market, Revdi Bazar.	014772	18,731-00	10-10-96
2. As above	014771	20,979-00	9-10-96
3. As above	014762	12,038-00	6-10-96
4. As above	014751	6,560-00	10-10-96
5. As above	014778	15,545-00	10-10-96.

3. The said cheques were deposited by the respondent No.2 in the Bank on 10-10-96 which came to be dishonoured on 22-10-96. Respondent No.2, thereafter, through her advocate served statutory notice under Section 138 (b) of the Act to the petitioners which was received by the petitioners on 24-10-96. Petitioners gave reply to the said notice on 2-11-96. As the petitioners did not comply with the statutory notice and did not make the payment of the dishonoured cheques, on 20-11-96 a

complaint came to be filed against the petitioners in the Court of Metropolitan Magistrate, Ahmedabad, for the offence punishable under Section 138 of the Act.

4. The said complaint was registered as Criminal Case No.2793 of 1996. The learned Metropolitan Magistrate Court No.16, Ahmedabad, examined the complainant on oath and after satisfying himself with regard to the allegations made in the complaint, took cognizance as the complaint disclosed ingredients of the offence under Section 138 of the Act. After taking cognizance of the offence under Section 138 of the Act, the learned Metropolitan Magistrate issued process against the petitioners for the said offence, which has been challenged by the petitioners by filing this Misc. Criminal Application.

5. Learned counsel for the petitioners Mr. Y.F. Mehta has submitted that prima facie the complaint does not disclose the ingredients of the offence punishable under Section 138 of the Act. It is submitted that the necessary ingredients that the petitioners had issued cheques towards the discharge of debt or other liability is found missing in the complaint, and therefore, the complaint requires to be quashed. Learned counsel for the petitioners has also submitted that the cheques in question were not issued towards the debt or any other liability, and therefore, the ingredients under Section 138 of the Act were not attracted and hence, the complaint also requires to be quashed. It is further submitted by the learned counsel for the petitioners that the complaint is not filed by the authorized person of Mahesh Label Co. and on that ground also the complaint requires to be quashed. It is further submitted by the learned counsel for the petitioner that while issuing process, learned Magistrate failed to appreciate that even if the averments made in the complaint be taken at its face value, no offence under Section 138 of the Act was made out. Hence, the complaint is liable to be quashed. It is further submitted by the learned counsel for the petitioners that in view of the fraud played by the agents with the petitioners, a public notice in the daily newspaper was published on 9-10-96, 14-10-96 and 22-10-96 and the parties to whom the cheques were issued were instructed not to deposit the cheques for encashment and inspite of the instructions the cheques were deposited, and therefore, the provisions of Section 138 of the Act will not be attracted.

6. Learned counsel for the respondent No.2 has contended that the complaint and its accompaniments does

disclose the ingredients of the offence punishable under Section 138 of the Act that the petitioner No.1 Company had accepted the cheques issued by various businessmen of Ichal Karanjee and after deducting commission, the petitioner No.1-Company had issued the cheques towards the amount which they had received. It is contended by the learned counsel for the respondents that the petitioners gave reply to the notice and had accepted their liability to pay the amount of dishonoured cheques and the said reply to the notice was annexed with the complaint. It is further contended by the learned counsel for the respondent No.2 that the learned Magistrate after satisfying to the averments made in the complaint and the documents annexed with the complaint had issued process against the petitioners. It is further submitted by the learned counsel for the respondent No.2 that as per the decision of the Supreme Court reported in JT 1998 (1),SC,190, the stopage of payment could not exonerate the petitioners from attracting the provisions of Section 138 of the Act.

7. Learned counsel for the petitioner in support of his submission that the complaint does not disclose the ingredients of Section 138 of the Act and hence the complaint and the process issued by the learned Magistrate requires to be quashed has placed reliance on the following decisions.

1. 1996 SCC (Cri) 1124, Keshub Mahindra v.1996 SCC (Cri) 1124, Keshub Mahindra v. State of M.P.
2. 1996 SCC (Cri.) 897, P.S.Rajya v. State of Bihar.
3. A.I.R. 1992 SC 604 State of Haryana and others, v. Ch. Bhajan Lal and others.
4. A.I.R. 1979 SC 850 Trilok Singh and others v Satya Deo Tripathi.
5. A.I.R. 1988 SC 709 Madhavrao Jiwaji Rao Scindia and another,etc. v Sambhajirao Chandrojirao Angre and others.

8. In Keshub Mahindra's case (Supra), the Supreme Court by exercising powers under Section 482 and 397 of the Code and under Articles 142, 136, 227 and 228 of the Code quashed and set aside the charges framed against the accused as the offences alleged found to have not been prima facie made out. However, the Supreme Court directed the trial Court to frame charge for another offence which though not found place in the charge sheet,

but whereunder the case was initially registered.

9. In P.S.Rajya's case (Supra) the Supreme Court had quashed the prosecution of the appellant under Section 5(2) read with Section 5 (1) (e) of the Prevention of Corruption Act, 1947, on the ground that the Central Vigilance Commission in its report had exonerated the appellant of all the charges for which the prosecution was launched. The Supreme Court held that :-

" the standard of proof required to establish the guilt in a criminal case is far higher than the standard of proof required to establish the guilt in the departmental proceedings. In the instant case, the charge in the departmental proceedings and in the criminal proceedings is one and the same. If the charge which is identical could not be established in a departmental proceedings and in view of the admitted discrepancies in the reports submitted by the valuers one wonders what is there further to proceed against the appellant in criminal proceedings.

On these facts, the Supreme Court quashed the criminal proceedings launched against the appellant.

10. In the case of State of Haryana and others v. Bhajan Lal and others (Supra), the Supreme Court laid down seven categories by which exercise of powers under Article 226 of the Constitution of India or under Section 482 of the Code of Criminal Procedure, the High Court may interfere with any proceeding relating to cognizable offences to prevent abuse of the process of any Court or otherwise to secure ends of justice. However, the Supreme Court held that these powers should be exercised sparingly and that too in the rarest of rare case.

11. In Trilok Singh's case (Supra) the Supreme Court quashed the issuance of process to prevent the abuse of the process of the Court on the ground that the dispute raised was purely of a civil nature and criminal proceeding initiated was an abuse of the process of the Court and deserves to be quashed.

12. In Madhavrao Jiwaji Rao Scindia's case (Supra) the Supreme Court quashed the criminal proceeding in respect of two persons, but they were allowed to be continue against rest on the ground that alleged breach of trust constitute only civil wrong. The Supreme Court quashed the criminal prosecution against the two persons also on the ground that the ingredients of the offence

under Sections 406 and 467 were wanting with respect to two persons, and therefore, the criminal proceedings were quashed with respect to two persons. In the said decision, the Supreme Court further observed that the process of the Court cannot be utilized for any oblique purpose and where in the opinion of the court chances of an ultimate conviction are bleak, and therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of the particular case also quash the proceeding even though it was at a premature stage.

13. This Court is in entire agreement with the principles laid down in the decisions referred to above. The exercise of the powers conferred by Article 226 and 227 of the Constitution of India or under Section 482 of the Code would depend upon the facts and circumstances of each case, but with the sole purpose to prevent abuse of the process of any court or otherwise to secure the ends of justice. In the light of the principles laid down by the decisions referred to above, let us examine the contentions raised by the learned counsel for the petitioner as to whether the complaint and documents annexed with it prima facie establish the ingredients of Section 138 of the Act. Section 138 of the Act reads as under.

138 Dishonoured of cheque for insufficiency, etc. of funds in the account Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either, because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both :

Provided that nothing contained in this section shall apply unless-

(a) the cheque has been presented to the bank within a period of six months from the

date on which it is drawn or within the period of its validity, whichever is earlier ;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount or money by giving a notice in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid ; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.

Explanation :- For the purpose of this Section, "debt for other liability" means a legally enforceable debt or other liability.

14. Section 142 of the Act provides the conditions under which the Court may take cognizance of offences under the Act. Section 142 reads as under :

142 Cognizance of offence- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-

(a) no court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque ;

(b) such complaint is made within one month of the date on which the cause of action arise under clause (c) of the proviso to Section 138 ;

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under Section 138.)

15. It is an admitted fact that the petitioner No.2 is the Director of the petitioner-Anchor Capitals of India Limited and is carrying the business of financing and ancillary activities. That in furtherance of the said activities, the petitioner No.1-Company had to

appoint various agents to conduct the business of the Company with limited authority and powers. Somewhere in the month of October 1996, it came to the notice of the present petitioners that various agents had played fraud with the Company and had misused the cheques given to them by various businessmen. It is also an admitted fact that the respondent No.2 had transacted with the agents of the Company at Ahmedabad and had obtained cheques as mentioned in the complaint. The said cheques were issued in the name of Mahesh Label Company of which respondent No.2 is the sole proprietor. It is also an admitted position that when the said cheques were deposited by the respondent No.2, they were dishonoured.

16. In paragraph 2 of the complaint, it is averred that the accused No.1 is the Company, accused No.2 is the Managing Director, whereas accused No.3 (not before this Court) is the Director and authorized signatory of the petitioner No.1-company. That the petitioner No.1 Company is having 24 branches all over India situated in different cities. That as per the practice of the petitioner No.1- company, different branches of the petitioner No.1-company receives cheques from businessmen and after deducting their commission, they issue cheques to the parties where the said party is having its office or business. That the said cheques are issued at the instruction of the petitioner NO.2 after deducting the commission of the Company.

17. In paragraph 3 of the complaint, it is alleged that the respondent No.2 (complainant) is the sole proprietor of Mahesh Label Company of Ahmedabad. Various businessmen of Ichal Karanjee had issued cheques in the name of Mahesh Label Company which were handed over to the petitioner No.1- company. That on the instruction of the respondent No.2, the accused No.3 (not before this Court) had issued five cheques of the total amount of Rs.73,853/- to the complainant after deducting company's commission. Reference of the said cheques is made in the earlier part of this judgment. It is alleged that all these five cheques when deposited in the Bank, were dishonoured with an endorsement " stop payment ". It is further alleged that on 22-10-96, respondent No.2 gave statutory notice under Section 138 (b) of the Act to the petitioner No.1-company, which was received by the petitioner No.1-company on 24-10-96 . It is alleged that the petitioner No.1- company through its advocate had replied to the notice on 2-11-96. That the said reply was given on the instruction of the Managing Director of the Company i.e. petitioner No.2. It is also alleged that after the said statutory notice, petitioners had

failed to pay the amount of cheques as demanded, and therefore, respondent No.2 was constrained to file the complaint.

18. Along with the complaint, the documents namely xerox copies of the cheques, notice sent to the petitioners, dated 22-10-96 and the reply sent by the petitioners, dated 2-11-96 were annexed.

19. To constitute an offence under Section 138 of the Act, the following ingredients need to be fulfilled :-

(i) Cheque should have been issued for the discharge, in whole or part, of any debt or other liability.
(ii) The cheque should have been presented within the period of 6 months or within the period of its validity, whichever is earlier.
(iii) The Payee or the holder in due course should have issued a notice in writing to the Drawer within 15 days of the receipt of information by him from the Bank regarding the return of the cheque as unpaid.
(iv) After the receipt of the said notice by the Payee or the holder in due course, the Drawer should have failed to pay the cheque amount within 15 days of the receipt of the said notice.
(v) On non-payment of the amount due on the dishonoured cheque within 15 days of the receipt of the notice by the Drawer, the complaint should have been filed within 1 month from the date of expiry of the grace time of 15 days, before a Metropolitan Magistrate or not below the rank of a Judicial Magistrate, of the First Class.

20. It is well settled principle of law that a Magistrate can take cognizance when the major ingredients of the Section as referred above and Section 204 of Criminal Procedure Code are complied with. So far as Section 142 of the Act is concerned one can say that the Section is independent of the provisions of the Code of Criminal Procedure, 1973. At the time of taking cognizance under Section 142 of the Act, the Court is not supposed to make a meticulous analysis and it should ensure that the ingredients of the Section constituting the dishonoured of the cheques as an offence have been made out at the time of taking cognizance. It is true that in complaint the very words of Section 138 that the cheques were issued towards the discharge of whole or any part of debt or any liability are absent, but that need not result into the complaint not filed under Section 138 of the Act. In my view, one need not repeat the very

words found in Section 138 of the Act to constitute an offence. The complaint and the documents annexed with it are to be looked into. If the allegations in the complaint make out such a meaning that the cheques were issued towards the consideration received by the petitioner-Company would be sufficient to attract the provisions of Section 138 of the Act. One need not necessarily extract and put the very words in the complaint to comply with the requirement of the section. There need not be any such ritualistic repetition in the complaint (See 1 (1995) Banking Cases, Page 575 (Madras High Court)).

21. In case of S.Mohan Singh v. Madan Lal, 1996 Criminal Law Journal, Page 333, an identical question arose before the Jammu and Kashmir High Court that whether it is necessary to aver in the complaint the ingredients of Section 138 of the Act. The High Court in deciding the above question referred to Section 139 of the Act and held that Section 139 creates a statutory presumption that a cheque issued in the nature referred to under Section 138 of the Act, is always issued in discharge of debt or other liability. In that context, it is observed that it is not necessary for the complainant to specifically plead that the cheque which was issued to him and dishonoured was in fact issued in the discharge of a debt or a liability. It is further observed that, however, it is for the accused to show that the cheque in question was not issued in discharge of any debt or other liability. The High Court, therefore, held that reading Section 138 and 139 of the Act together, it becomes abundantly clear that it is for the accused to show that the cheque issued by him and dishonoured by the bank was not in the discharge of any debt or liability.

22. In Iqbal v. Uthaman 1994 (2) Crimes, 72, the Kerala High Court while answering the question that is it imperative that all the ingredients of the offence as such should be specifically and expressly stated in the complaint ? Is is not sufficient that the Court could make out such ingredients from the body of the complaint and the papers accompanying it ? Before the Kerala High Court it was argued by the learned counsel for the petitioner that the complaint does not satisfy the ingredients of Section 138 of the Act, and therefore, it does not make out the offence. The High Court dealing with this contention raised by the learned counsel for the petitioner, referred to Section 2 (d) of the Code which defines complaint and held that an oral complaint is not useful for the offence punishable under Section

138 of the Act. Since Section 142 of the Act forbids the Court from taking cognizance of the offence except upon a written complaint. Section 190 of the Code empowers the Magistrate to take cognizance upon receiving complaint and the facts which constitutes such offence, but High Court in paragraphs 11 and 12 observed as under :

"11. A combined reading of relevant provisions would amplify the position that if the facts set out in a complaint would constitute the offence alleged to have been committed by some person, the Magistrate has power to take cognizance of the offence under Section 138 of the Act. It must be borne in mind that no form is prescribed for drafting a complaint. A meticulous scrutiny of the complaint may not be warranted at the initial stage to ascertain whether all the elements of the offence have expressly been categorised therein. It is enough that a pragmatic assessment is made after perusing the complaint to decide whether the complaint discloses the offence under Section 138 of the Act. If the complaint is prepared by a layman one cannot expect skilful draftsmanship being reflected therein. It may be in artistically worded or clumsily prepared. Yet it may contain the allegations from which a Magistrate can see the offence disclosed. Dismissing such complaint on the premise that elements of the offence have not been expressly categorised in the complaint may result in miscarriage of justice. Hence the Court has a duty to peruse the complaint with a pragmatic perception.

12. Speaking for a division bench of this Court Varadaraja Iyengar, J. In Kunju Moideen v. Kandan, A.I.R. 1959 Ker. 16, has pointed out that : " it is nowhere insisted that the complainant must categorise the elements of the offence sought to be charged against the accused." Hidayattullah, C.J. in Bhimappa v. Laxman, A.I.R. 1970 S.C. 1153, has observed that no form is prescribed which the complaint must take. " It may only be said that there must be an allegation which prima facie discloses the commission of an offence from the necessary facts for the Magistrate to take action."

23. Bearing in mind the principles laid down in the aforesaid decisions, in my view, the complaint and its accompaniments in the present case, if read and

understood from the above angle, one can listen therefrom with reasonable accuracy that the cheques in question were issued towards the discharge of debt and other liability. Petitioner No.1-company had already received the consideration of the cheques which were handed over to it by the respondent No.2 of the businessmen of Ichal Karanjee. After receiving the cheques, petitioner No.1-Company had credited the same in its account and after deducting the commission of the said cheques, had issued fresh cheques to the respondent No.2 towards the amount received by the Company. Therefore, it can be said that the cheques in question were issued towards the discharge of debt and other liability. In the reply, dated 2-11-96 also the petitioner No.1-company had admitted their liability to pay the amount of cheques to the respondent No.2 within 45 days. Therefore, in my considered view, the complaint prima facie does disclose the ingredients of Section 138 of the Act.

24. It is contended by the learned counsel for the petitioners that as the agents of the company played fraud and when the Company realized about the fraud, they had given a public notice in various daily newspapers on 9-10-96, 14-10-96 and 22-10-96 and the parties to whom the cheques were issued by the petitioner No.1-company were instructed not to deposit the cheques for encashment. According to the submission of the learned counsel for the petitioners, as there were instructions of stop payment and inspite of those instructions, if the cheques were deposited and dishonoured, the provisions of Section 138 of the Act are not attracted. In support of the contentions, learned counsel for the petitioner has placed reliance on the decision of the Supreme Court in the case of K.K.Sidharthan v. T.P. Praveena Chandran and another, reported in 1996 (6) SCC, 369. In my opinion, the submission of the learned counsel for the petitioners deserves to be rejected. The Supreme Court in a later decision of the larger Bench in the case of M/s Modi Cements Limited v. Shri Kuchil Kumar Nandi, reported in JT 1998 (2) SC, 198, has ruled that once a cheque is issued by the drawer, presumption under Section 139 of the Act must follow and merely because drawer issues a notice to the drawee or to the bank for stopage of payment it will not preclude an action under Section 138 the Act by the drawee or the holder of a cheque in due course. It is also held by the larger Bench of the Supreme Court that :

" It is needless to emphasize that the Court taking cognizance of the complaint under Section 138 of the Act is required to be satisfied as to

whether a prima facie case is made out under the provision. The drawer of the cheque undoubtedly gets an opportunity under Section 139 of the Act to rebut the presumption at the trial. It is for this reason we are of the considered opinion that the complaints of the appellant could not have been dismissed by the High Court at the threshold. "

25. In view of the decision of the larger Bench of the Supreme Court in the case of M/s Modi Cement Ltd. (Supra), the public notice given by the petitioners to the various cheque holders not to deposit the cheques and instructing their Bank to stop payment will not absolve them from the liability under Section 138 of the Act.

26. The complaint and its accompaniments, prima facie disclose the offence under Section 138 of the Act, the Metropolitan Magistrate was justified in issuing the process against the petitioners. The submission of the learned counsel for the petitioners that the process issued by the learned Magistrate is without application of mind as no offence under Section 138 of the Act is made out is devoid of any merit.

27. In my view, the complaint and its accompaniments prima facie do show the ingredients of Section 138 of the Act. Therefore, the complaint cannot be thrown or quashed at the threshold. In my view, the complaint is not filed to abuse the process of Court. The defences raised by the petitioners in this application can be decided when the parties go to the trial.

28. This is not rarest of rare case wherein interference of this Court is called for in the exercise of its inherent powers under Section 482 of the Code to quash the complaint.

29. These were the only contentions raised by the learned counsel for the petitioners and the respondent No.2.

30. As a result of the foregoing discussions, I do not find any merits in this application. Therefore, it is rejected. Rule discharged.

31. At this stage, Mr. Y.F. Mehta, learned advocate for the petitioners has requested this Court to extend the interim relief granted on 19-1-98 for a period of six weeks so as to enable the petitioners to approach the higher forum. In my view, the request of the learned

counsel for the petitioners is reasonable and hence, interim relief granted earlier is extended for a period of six weeks to enable the petitioners to approach the Higher Forum. Direct service permitted.

* * * *